UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA

v. **CASE NUMBER: 8:03-CR-77-T-30TBM**

HATIM NAJI FARIZ
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DEFENDANT HATEM NAJI FARIZ'S RESPONSE IN OPPOSITION TO THE GOVERNMENT'S MOTION IN LIMINE NO.2

Defendant, HATEM NAJI FARIZ, by and through undersigned counsel, hereby respectfully submits his response in opposition to the government's Motion in Limine No. 2. (Doc. 974.) As grounds in support, Mr. Fariz states:

In its Motion in Limine No. 2 (Doc. 974), the government argues that the defendants in this case should be precluded from arguing any defense based on a claim of right, and states that "the United States does not concede that Palestinians as a collective ethnic group have any cognizable claim of right under international law to the area comprising Israel or the Territories." (Doc. 975 at 2.) In this regard, the motion seeks to specifically preclude a defense based on recognition and evidence of the Palestinian right of return. Simply put, the government's argument regarding the issue of the right of return is misleading, and seems to intentionally disregard both the nature and basis of the right itself. A brief discussion of history is therefore necessary to understanding this complicated issue.

Approximately 750,000 out of 900,000 Palestinians became refugees as a direct result of predetermined Israeli military policy to ethnically cleanse those areas that became the state

of Israel in the conflict of 1948. *See* Baruch Kimmerling, Politicide: Ariel Sharon's War Against the Palestinians 25 (2003); David Hirst, The Gun and the Olive Branch 263-69 (2003). This view has been exhaustively documented by a series of Israeli and Palestinian historians who have thoroughly researched the archives of the state of Israel in reaching this conclusion. *See, e.g.*, Nur Masalha, The Politics of Denial 26-41 (2003) (detailing the Israeli documentary evidence of the ethnic cleansing of the Palestinians and the efforts of Israeli historians Benny Morris, Simha Flapan, Tom Segev, Ilan Pappe, and Avi Shlaim in this regard).

There are currently some 4.23 million refugees from Palestine registered with the United Nations: 1,776,669 in Jordan, 952,295 in the Gaza Strip, 682,657 in the West Bank, 421,737 in Syria, and 399,152 in Lebanon. *See* UNRWA in Figures as of December 31, 2004 at http://www.un.org/unrwa/publications/pdf/uif-dec04.pdf. These refugees are prevented from returning to the areas of their origin within Israel by virtue of several laws passed by Israel in the early 1950s. The chief laws were a) the Nationality Law of 1952, passed by the Israeli Knesset, which barred nearly all those Palestinians displaced by Israel in 1948 from Israeli citizenship, due to their enforced absence from the state and b) the Absentee Property Law of 1950, which allowed the state of Israel to confiscate the property of those Palestinians displaced in 1948. *See, e.g.*, John Quigley, *Repatriation of Displaced Palestinians as a Legal Right*, 8 Nexus 17, 21 (2003) (on the Nationality Law); Masalha, The Politics of Denial 154-56. Conversely, the Israeli Law of Return allows all members of the Jewish faith the world over the right to automatic Israeli citizenship. *Rife v. Ashcroft*, 374

F.3d 606, 611 n.2 (8th Cir. 2004) ("'The Law of Return (1950) grants every Jew wherever he may me the right to come to Israel. . .and become an Israeli citizen'") (quoting an Israeli Foreign Ministry document) ; *Abdille v. Ashcroft*, 242 F.3d 477, (3rd Cir. 2001); *Gilfillan v. City of Philadelphia*, 637 F.2d 924, 936(3rd Cir. 1980) ("The Law of Return, for example, announces the right of every Jew to settle in Israel").

As a result of Israel's refusal to repatriate the Palestinian refugees, the international community has attempted to address this issue. The basis of the Palestinian refugees' right of return is U.N. General Assembly Resolution 194(III), which has enshrined the principle of the right of return. It reads in pertinent part:

> the refugees wishing to return to their homes and live in peace with their neighbors should be permitted to do so at the earliest practicable date, and that compensation should be paid for the property of those choosing not to return and the for the loss of or damage to property which, under the principles of international law or in equity, should be made good by the Governments or authorities responsible.[1]

Resolution 194 has been reaffirmed every year since its passage. Initially, it should be noted that Israel's admission into the United Nations in General Assembly Resolution 273 was conditioned upon its full implementation of the provisions of Resolution 194.[2] In *The Palestine Problem in International Law and World Order*, the late Prof. W. Thomas Mallison and Sally V. Mallison explain that one of the functions of the General Assembly is "as an instrument to express consensus on major international legal issues by majorities substantially in excess of the two-thirds vote required by the [U.N.] Charter for important

[1]G.A. Res. 194, U.N. GAOR, 3rd Sess., at 24, U.N. Doc. A/810 (1948).

[2]G.A. Res. 273(III), U.N. GAOR, 3rd Sess., at 18, U.N. Doc. A/900 (1949).

questions."[3] This is a "practice . . . particularly evident in General Assembly resolutions concerning Palestine, Israel, and the Middle East."[4]

Later resolutions have reaffirmed "the inalienable right of the Palestinians to return to their homes and property from which they have been displaced and uprooted, and calls for their return."[5] At the time Resolution 194 was passed, the notion of the right of return had been enshrined by customary international law, which by its nature is binding.[6] Finally, with respect to any argument that a General Assembly resolution cannot create binding international law, it seems disingenuous at best for Israel, which derived its legitimacy as a state and subsequently was admitted to the United Nations through resolutions of the General Assembly, to now make such a contention.

International law has clearly articulated the principle of a right of return in all the major instruments that speak to this issue. For example, the Fourth Geneva Convention of 1949 states that "[i]ndividual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying power or to that of any other

[3]W. Thomas & Sally V. Mallison, The Palestine Question in International Law and World Order 51 (1986).

[4]*Id.*

[5]G.A. Res. 3236, U.N. GAOR, 29th Sess., Supp. 31, at 4, U.N. Doc. A/9631 (1974).

[6]G. J. Boling, *The 1948 Palestinian Refugees and the Individual Right of Return: An International Law Analysis*, at 10-14, 48 (2001), (BADILResource Center for Residency and Refugee Rights, Bethlehem, Palestine), available at <www.badil.org/Publications/Legal_Papers/RoR48.pdf>.

country, occupied or not, are prohibited, regardless of their motive."[7] The Universal Declaration of Human Rights states that "[e]veryone has the right to leave any country, including his own, and return to his own country," and that "[n]o one should be arbitrarily deprived of his own property."[8] Finally, the International Covenant on Civil and Political Rights (ICCPR) declares: "No one shall be arbitrarily deprived of the right to enter his own country."[9]

With respect to the argument that Israel is not the Palestinians' "country" and hence, they have no right of return to it, Professor John Quigley has addressed this argument comprehensively, most recently in a 2003 law review article. He notes that "[w]hen a state experiences a change in sovereignty, the state is still obligated to allow admission to nationals who would have been entitled to admission had there been no change in sovereignty." John Quigley, *Repatriation of Displaced Palestinians as a Legal Right*, 8 Nexus at 19. Further, he remarks that an individual acquires the nationality of a successor state in situations where a denial of nationality would result in statelessness. *Id.* With respect to the position that international law, as embodied in the ICCPR, did not envision a mass return of refugees in the Palestinian context, but rather articulates an individual right,

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[7]Geneva Convention Relation to the Protection of Civilian Persons in the Time of War, Aug. 12, 1949, art. 49, 6 U.S.T. 3516, 75 U.N.T.S. 287.

[8]Universal Declaration of Human Rights, arts. 13(2), 17(2), G.A. Res. 217 A (III), U.N. Doc. A/810 at 74 (1948), available at <www.un.org/Depts/dhl/resguide/resins.htm>.

[9]G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966).

Professor Quigley rationally notes that there can be no numerical cap on the exercise of individual rights, and that "[i]f the argument against the right of return for persons displaced en masse were allowed to succeed, then the argument in favor of right of return for the individual would also have to fail." *Id.*

Since the right of return is both an individual and collective right, all Palestinian refugees are entitled to the exercise of this right, whether or not the government brands them as members of the "PIJ Enterprise" or not. Further, because at its heart it is an individual right, as UN GA Resolution 194 makes clear, the government's contention that the alleged PIJ Enterprise does not represent the Palestinian people and therefore cannot assert a collective right fails to adequately appreciate the nature of this right. (Doc. 975 at 7-8.)

Even if one accepts the government's allegations in their entirety regarding the defendants and the activities of the alleged PIJ enterprise, the resulting scenario is one in which essentially Palestinian refugees are being accused of extorting their ancestral homeland, to which a longstanding and valid United Nations General Assembly resolution affirms their individual and collective right to return. None of the cases the government cites to underpin its argument contemplate a situation in which the accused, as individual Palestinians and collectively, have a valid United Nations resolution affirming their actual (as opposed to a claimed or purported) right.

The background and history of the Palestinian exodus in 1948 and the internationally sanctioned right of return underscore and amplify Mr. Fariz's position that the government's

theory of extortion revolves around the notion of sovereignty, which by its nature cannot be extorted. *United States v. Al-Arian*, 308 F. Supp.2d 1322, 1356 (M.D. Fl. 2004) ("In light of *Scheidler*, this Court is in serious doubt whether such an intangible property right is capable of being extorted"). As the Court has noted in this regard:

> Defendant characterizes the Superseding Indictment as a "superficial attempt" by the government to allege extortion as to property, and remains convinced that the government's theory is "one of sovereignty, not tangible properties." As pointed out to the Defendant at the oral argument hearing on December 3, 2004, this argument is premature. The appropriate time for Defendant to raise this argument will be at the close of the Government's case, if the Government fails to present evidence proving that the purpose of the extortion scheme was to obtain the physical property within the State of Israel. (Doc. 833 at 4.)

It is therefore clear that the nature of the right of return, and its history and status in international law, makes the government's theory of extortion untenable. The political nature of the alleged threats of the so-called PIJ Enterprise is obvious from the point of view of the right of return. The object of the alleged extortionate scheme is clearly not the theft of property by legal means, but a struggle over political rights and the nature of the polity controlling the land of historical Palestine, i.e., Israel and the Occupied Territories.

WHEREFORE, Defendant Hatem Naji Fariz respectfully requests that the Court deny the government's Motion in Limine No. 2 in its entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of May, 2005, a true and correct copy of the foregoing has been furnished by CM/ECF, to Walter Furr, Assistant United States Attorney; Terry Zitek, Assistant United States Attorney; Cherie L. Krigsman, Trial Attorney, U.S. Department of Justice; William Moffitt and Linda Moreno, counsel for Sami Amin Al-Arian; Bruce Howie, counsel for Ghassan Ballut; and to Stephen N. Bernstein, counsel for Sameeh Hammoudeh.

/s/ Wadie E. Said
Wadie E. Said
Assistant Federal Public Defender